tion, which the patentee has chosen to claim in addition to the main or principal invention consisting in the complete safety razor.

* * * * * *

"The claims relate to a blade with means to 'cooperate' and to 'retain.' One of the means is stated: it is the centrally disposed opening. The others are referred to merely as 'means spaced from said opening'. If we look at the rest of the specification and at the drawings, to assist in comprehending what these means are, we find that what the patentee had in view and what he intended to claim were four notches or openings, at the ends of the blade, adapted to receive projections extending from the backing member of the razor. So that, so far as concerns the blade, the means disclosed throughout are nothing but holes, one set of means being the central hole and the other, the holes or openings in the ends.

"We would not think the patentee intended to make the broad claim to the monopoly of the right to perforate any and all shapes of holes in a razor blade of the type in question. That alone would be quite sufficient to invalidate the claim, for evidently, having regard to the prior art, the claim would be abnormally wide. * * *

"But the appellant argues the openings in the blade he claims as new are openings with certain functions in the holder and the openings in the earlier blades were not intended to function in the same way as the openings described in the claims in suit. A claim for a blade having openings with certain functions in the holder comes perilously near being a claim for the combination and not a claim for the so-called subordinate invention, for, in such a case, the utility of the holes depends entirely upon their co-operation with the projections in the other members of the razor. In any event, the moment the validity of the subordinate invention is put on that ground, it necessarily limits the form of the holes in the blade to that

of holes shaped in the particular way required to function in the holder and that is to say: to holes precisely as described in the specification for the purpose of functioning in the precise holder therein described.

* * * * * *

"The blade as designed by the respondent may fit the razor patented by the appellant, although it would not fulfil the functions intended in claims 4 and 5—or, at least not in the same way—but it will also fit the bar type razor, the Goodwill razor and other holders, according to the evidence.

"The respondent's blade does not correspond to the blade described in the specification and in the drawings. There was no infringement. Of course, the appellant urges the respondent's blade is substantially similar to the blade used in the Goodwill type of razors. The answer is that the Goodwill blade is not the article disclosed in the patent."

TO SUM UP—

The claims in suit being for a safety razor blade, notched and apertured merely that it may fit its holder, are invalid for lack of invention—whatever the patentable merit of the holder. They are, moreover, anticipated by the expired patents to Hartman and Ballreich, both of which disclose double-edge safety razor blades similarly notched and apertured and inherently capable of performing all the functions of the patented blade. If, however, the claims are to be given such a limited scope as not to be anticipated by Hartman and Ballreich because of asserted differences either in function or structure, then they are not infringed by petitioner's blade for the reasons given by the Circuit Court of Appeals for the Second Circuit in *Gillette Safety Razor Company* v. *Hawley Hardware Company* and by the Supreme Court of Canada in *Gillette Saf-*

ety Razor Company of Canada, Limited, v. *Pal Blade Corporation, Limited, et al.* And finally, it must not be forgotten that for seventeen years respondent enjoyed a monopoly of the wafer-type safety razor blade, and that the Gaisman blade of the patent in suit differs from the blade of the original Gillette patent only in the shape and location of the holes that serve to hold the blade in place in the razor. The present suit is the culmination of a series of suits brought by respondent for the obvious purpose of reviving the blade monopoly lost when its basic patent expired—"the constant efforts of those who have enjoyed a profitable patent monopoly to lengthen such monopoly by patents for non-inventive changes".

This whole litigation wears an aspect of improbability. That the Patent Office in the Year of Grace 1927 should have allowed claims to a safety razor blade whose sole pretense to patentable novelty was a non-circular hole in its middle and notches in its ends is hard enough to believe in all conscience—though such things do sometimes happen; but that infringement of those claims should have constituted the gravamen of two hard fought law suits (three, if we include the Canadian) would be *quite* incredible were the facts not so well attested. . . . We hope that this Court will indicate its unmistakable disapproval of the whole silly and indefensible business.

To this end we pray that the decree of the Circuit Court of Appeals for the Third Circuit be reversed and that of the District Court, dismissing the bill, be affirmed.

Respectfully submitted,

George E. Middleton,
C. M. Palmer,
Counsel for Petitioner.

September, 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 21

ESSEX RAZOR BLADE CORPORATION
Petitioner

vs.

GILLETTE SAFETY RAZOR COMPANY
Respondent

REPLY BRIEF FOR PETITIONER

GEORGE E. MIDDLETON
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REPLY BRIEF FOR PETITIONER

RESPONDENT'S lengthy brief contains many arguments which we believe to be unsound and citations which we believe to be inapt. Wanting the patience to make a full reply, and being convinced, moreover, that such a reply is unnecessary and would only burden the Court, we content ourselves with the following brief comments:

THE CONFLICT

Respondent, on page 2 of its brief, presumes to instruct the Court as to those matters which it will and will not consider on this petition. Respondent would limit the Court to a consideration of infringement alone because, "the only question on which there has been a conflict of deci-

sions is as to infringement". Respondent is confused, we think, as to the true nature of the conflict, which, in the interest of clarity, we here briefly restate.

The Gaisman patent has been involved in two suits in this country, one in the Second Circuit, one in the Third, and in both suits the accused blade was the same. The Circuit Court of Appeals for the Second Circuit in *Gillette* v. *Hawley* held that respondent had no right under its patent to a monopoly of the accused blade, whereas the Circuit Court of Appeals for the Third Circuit in the instant suit held that it had.

> "Thus as matters stand," we said on page 5 of the petition, "a blade that can be freely made and sold in the Second Circuit is an infringement in the Third, and its manufacture and sale there enjoined.
>
> "The doubt and confusion which must inevitably ensue because of this conflict can be resolved only by this Court".

It is preposterous to suggest that this Court in resolving this conflict is limited in the scope of its inquiry and will consider only the technical question of infringement. In *Bassick Mfg. Co.* v. *R. M. Hollingshead Co.*, and *Rogers* v. *Alemite Corp.*, 56 S. Ct. 787, the conflicts were "with respect to the scope and alleged infringement" of certain claims. Although both courts of appeals whose decisions were in conflict had held the claims valid, the question of validity was, nevertheless, raised by the defendants and considered by this Court (p. 789):

> "Although in the instant cases the validity of the claims is denied, we think they disclose novelty and invention to the extent indicated".

It is difficult to conceive how conflicting decisions on scope and infringement can be considered and the conflict re-

solved without bringing validity into question; for if the claims are invalid a finding of infringement becomes a vain thing. It must be remembered too that the instant case presents no question of concurrent findings by the courts below that the claims in issue involve invention. The District Court held the claims invalid and the Court of Appeals for the Second Circuit in the *Hawley* case did not pass on validity; it merely failed to hold the claims before it *in*valid—which is quite a different thing from a positive finding of validity. Indeed that Court's statement:

> "Moreover, the matter of obtaining proper shaving relation between the parts of the razor and the blade is not new in the present type of Gillette razor.",

is indicative, at least, that a finding of invalidity would have been made had the Court considered such finding necessary.

ANTICIPATION.

As we predicted, respondent has been quick to point out that the razors illustrated (for purpose of argument) on pages 14 and 15 of our main brief are not Hartman and Ballreich razors. Respondent goes further, however, and charges *us* with having invented them. We decline the honor and generously yield it to Gaisman; for certainly those razors are in no essential respect different from the Goodwill razor which is put forward as the embodiment of Gaisman's invention. But respondent has *not* pointed out, because it cannot, in what respects the Gaisman blade, as defined by the claims in suit, differs from either the Hartman or the Ballreich blade. Indeed respondent admits, tacitly at least, that the blades are structurally the same, but asserts, on page 58 of its brief, that this is of no importance:

> "Thus it is unimportant whether the structure of Gaisman's blade physically resembles prior structures. Even if he had used a blade of the precise contour shown in either the Hartman or Ballreich patents, because he used it in a new way to produce a new result he would be entitled to a patent thereon."

This is strange doctrine. Let us examine its implications:

1. The Hartman and Ballreich blades are, by postulate, "of the precise contour" of Gaisman's blade, but do not anticipate because Gaisman "used it [the old blade] in a *new way* to produce a *new result*". By "new way" respondent means that the blade acts as "the active element or key by which the positioning of all three parts of the razor [is] accomplished" (Respondent's brief, p. 5). The "new result" is the reduction in variation in blade exposure, due to cumulative tolerance errors, by 40%, that is from a possible 5/1000 of an inch in the old Gillette razor to 3/1000 in Gaisman's razor—a possible reduction of 2/1000 of an inch or one-half the breadth of a hair! (Respondent's brief, p. 11).

2. If the Hartman and Ballreich blades do not anticipate because not used in Gaisman's "new way" to produce his "new result", despite their having Gaisman's "precise contour", then it follows that *no* blade infringes that is not used in the "new way" to produce the "new result". That which does not anticipate if earlier does not infringe if later.

3. Respondent concedes that petitioner is "free, so far as the patent in suit is concerned, to manufacture and sell blades which will fit every one of the many millions of Gillette type razors which the respondent and others have produced, * * *" which do not embody Gaisman's invention (Respondent's brief, p. 44). By respondent's

leave, therefore, let us place one of petitioner's blades in one of these millions of razors which do not embody Gaisman's invention—in an old three-post razor, for example. *That* blade, obviously, is not used in Gaisman's "new way" and does not, of course, "produce a new result". Ergo, as we have proved (2), it does not infringe.

4. Thus are we led, willy-nilly, to the surprising conclusion that petitioner's blade in a Goodwill razor is an infringing blade, while *the same blade* in any other razor —or wrapped in cellophane for that matter—is not; that we cannot possibly know by a simple inspection of the blade itself into which category it falls. (It is conceivable—although we express no opinion on the point—that the combination of petitioner's blade in a Goodwill razor might infringe the combination claims of the patent, while the combination of the same blade in another razor might not. But we are concerned here with claims to the naked blade only.)

To round out the *reductio ad absurdum,* let us consider for a moment the case of the man who has on his bath-room shelf a Goodwill razor, an old style Gillette razor and a package of petitioner's blades. About to shave, he deftly removes a blade from the package and, holding it lightly between thumb and forefinger, contemplates his two razors, cogitating a choice. Which shall it be? Meanwhile, what of the blade so lightly poised? Is it an infringing blade, notched and slotted as it undeniably is? Or is it not? We do not know, nor shall we know until the choice of razors has been made. . . . All of which strikes us as not a little silly. And it certainly ruins respondent's proof of infringement.

Gaisman may have valid claims to the combination of his razor *and* blade by which the "new way" of use is made

possible; but valid claims to the old, bare blade itself? *Never.* There is nothing better settled in our patent law than this: that only *new* things are patentable; and not one of the authorities cited so profusely by respondent on pages 54 through 63 of its brief holds to the contrary; nor would be valid if it did. One of these, *Potts* v. *Creager,* 155 U. S. 597, is perhaps the leading case on the question of new use. There this Court, after reviewing the authorities, said (608):

> "As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use, but if the relations between them be remote, and especially if the use of the old device produce a new result, it *may* at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use." (Italics by the Court.)

"*Much, however, must still depend upon the nature of the changes required to adapt the device to its new use.*" But here, by postulate, *no* changes of *any* nature are required of the Hartman and Ballreich blades to adapt them to Gaisman's "new use". And there must be *some* change to support a patent. On this point the statute is clear. In *H. K. Regar & Sons, Inc.,* v. *Scott & Williams, Inc.,* 63 F. (2d) 229, quoted on page 59 of respondent's brief, the Court of Appeals for the Second Circuit has lately stated the law clearly and well. There as here, the attempt was made to sustain a patent for an old thing. The Court said:

> "Cases like * * * Potts v. Creager, 155 U. S. 597, 608, * * * are to be distinguished. When old devices are changed at all, the change may be dictated by a new

> conception, which it took originality to conceive. Strictly, the old device is not then put to a new use; the new use begets a new device. In such cases it requires but little physical change to make an invention. * * * But a new use of an old thing or an old process, quite unchanged, can under no circumstances be patentable; not because it may not take as much inventiveness to discover it, as though some trivial change were necessary, but because the statute allows patents only for a new 'art, machine, manufacture or composition of matter' (section 31, title 35, U. S. Code [35 U. S. C. A., §31]). The test is objective; mere discovery will not do."

Gaisman's mere discovery that the old blades of the Hartman and Ballreich patents might be used in a "new way to produce a new result" (assuming the novelty of the way of use and the result) is not enough. He cannot patent an "old thing . . . quite unchanged".

If now respondent cries: "Hold, not so fast; perhaps we *were* a bit hasty. Gaisman's blade does not, after all, have the *precise* contour of a Hartman or Ballreich blade. It is thus not an "old thing . . . *quite* unchanged": observe Gaisman's diamond-shaped central opening; observe his end notches",—if respondent says that, then we invite it to examine petitioner's blade once more and explain how such a blade infringes. Respondent may not make of its patent that amazingly selective firing-piece contrived "to hit it if it is a deer and miss if it is a cow"; a magic weapon indeed, but one encountered, happily, only in fairy tales. As the Circuit Court of Appeals for the Sixth Circuit said in *Wm. B. Scaife & Sons Co.* v. *Falls City Woolen Mills,* 209 Fed. 210, 213:

> "Obviously, the * * * broader view of the claim is necessary to make out infringement, and so the proof of anticipation must be considered from the same point of view, * * *."

THE "NEW PRINCIPLE".

> *"Prior to Gaisman no one ever produced a blade embodying Gaisman's new principle which caused the blade to act as a key to position all the parts of a safety razor."*

This declaration appears on page 44 of respondent's brief. Being fully italicized, it must be important. What then *is* this "new principle" embodied in Gaisman's blade "which cause[s] the blade to act as a key"? For the life of us we don't know. The only things *we* can see embodied in the Gaisman blade are the diamond-shaped central hole and the end notches. Do these things constitute a new principle? We wish that respondent had laid out, side by side, a Hartman blade, a Ballreich blade, a Gaisman blade, and an Essex (petitioner's) blade and had explained what "new principle" is embodied in the latter two not equally well embodied in the former.

This talk about principles being embodied in safety razor blades to cause them to act in certain ways is just so much nonsense. No matter what principles Gaisman's blade may embody, it cannot possibly "act as a key to position all the parts of a safety razor" until a very special razor comes along with all its parts designed for positioning. Without that razor, Gaisman's blade is just as impotent as the presumably unprincipled Hartman and Ballreich blades. *With* that razor, Hartman and Ballreich, for all their lack of principle, would coöperate quite as effectively as Gaisman, the embodiment of a principle—as we have demonstrated on pages 14 and 15 of our main brief. Which only goes to prove that although principle as a motivating force among men may be a highly desirable and effective thing, among razor blades it is altogether useless.

INFRINGEMENT.

A section of respondent's brief, beginning on page 25, is headed "Decreasing or impairing efficiency does not avoid infringement". As a general proposition this may be conceded. But where, as here, the whole reputed merit of the invention is in *increased* efficiency, those who are content with the old inefficiency, or worse, can hardly be accused of appropriating respondent's property. As a matter of fact the slot and notches in petitioner's blade are put there, quite evidently, not to make Gaisman's snug fit with the Goodwill lugs, and thereby reduce variation in blade exposure by 2/1000 of an inch (which they do not), but simply to escape those troublesome and wholly unwelcome excrescences on an otherwise excellent razor.

It is difficult, we are free to confess, to consider infringement in a case where the claims are so clearly invalid. But if they *are* valid, as respondent insists at such tiresome length, fortified by such a formidable array of authorities, it can only be because of things not present in petitioner's blade, either actually or potentially.

PATENTS DO EXPIRE.

In conclusion we wish to thank respondent for its generous reminder that the Gaisman patent will expire in eight years and that thereafter petitioner may make notched and slotted blades without let or hindrance soever. We had not supposed respondent aware of this latent defect in all patent grants—this blight of mortality—although ourselves quite sensible of it. But why, we wonder, must we wait eight long years for Gaisman's demise when the Hartman and Ballreich patents have already expired—Hartman and Ballreich, both of which disclose notched and slotted blades of Gaisman's "precise contour"?

Respectfully submitted,

GEORGE E. MIDDLETON,
C. M. PALMER,
Counsel for Petitioner.

October, 1936.

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Supreme Court of the United States

OCTOBER TERM, 1935.

ESSEX RAZOR BLADE CORPORATION, Petitioner, vs. GILLETTE SAFETY RAZOR COMPANY, Respondent.	No. 879

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This is an ordinary patent case in which respondent, assignee of the Gaisman patent No. 1,633,739 (R. 120), brought suit for infringement of claims 1 and 2 thereof involving a safety razor blade. The Circuit Court of Appeals for the Third Circuit in a well reasoned opinion held the patent valid and infringed (R. 230).

As pointed out in the opinion below, the invention increases by as much as 40% the accuracy with which the blade is positioned in the razor (R. 240, 241), thus, for the first time in the art, producing "a safe, non-face cutting Gillette razor" (R. 244) which the court referred to as a device "of high merit, an important advance, and one worthy of patent protection" (R. 238, fol. 241).[1]

The District Court found, during the trial, that petitioner's blade "is a Chinese imitation" (R. 54) and "I

[1] Gaisman introduced a new principle in the safety razor art by which he caused the blade to perform an entirely new function, namely that of retaining the guard and cap in accurate relation one to another and to the blade. This new principle is not disclosed anywhere in the prior art. The blade thus became the active element or key by which

have made up my mind there has been infringement" (R. 80). The statement in the petition for *certiorari* (p. 4) that "The issue of infringement was not passed upon by the District Court" is, therefore, incorrect. The District Court further remarked that the "equities are all" on the side of the respondent (R. 54). It appears that the officers of the petitioner were formerly officers of the respondent company (R. 244-245).

The Circuit Court of Appeals, concurring in the findings of the District Court, found with respect to infringement (R. 244):

> "That the defendant's blade is substantially a copy of Gaisman's device is clear."

The petition for certiorari does not assert that the case involves any important or novel question of law, or that there is any conflict of decisions upon the issue of the validity of the Gaisman patent. The sole ground stated in the petition (p. 5) as the reason for the granting of the writ is the contention that, in holding claims 1 and 2 of the Gaisman patent infringed by petitioner's blade the Court below has rendered a decision, respecting the *scope* of the claims, in conflict with a decision of the Circuit Court of Appeals for the Second Circuit in *Gillette Safety Razor Co.* v. *Hawley Hardware Co.*, 64 F. (2d) 10 (cert. den. 290 U. S. 649, Oct. 9, 1933).

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the positioning of all three parts of the razor was accomplished. As stated by the court below (R. 235):

> "We here note, as above stated, that in this Gillette type of razor Gaisman sought to improve, the blade was a passive, non-controlling and non-operating element in fixing, determining or maintaining the relation of the backing member and the guard member and *that his invention was in now making the blade the dominating and exclusive factor which positioned, maintained and kept in proper cutting position, first, the backing member; second, the guard member; and third, the proper cutting edge of the blade itself.*"

The District Court, in that case in the Second Circuit, held (60 F. (2d) 1019; Appendix hereto) that claim 1, and claim 3 not here in suit, of the Gaisman patent were valid and infringed. The Court of Appeals reversed solely on the ground of non-infringement without disturbing in any way the District Court's conclusion that the patent is valid.[2] The Court of Appeals held that the Clark or Hawley blade there involved "does not infringe the construction or perform the functions specified in claim 1" (64 F. (2d) 10, 11; Appendix to Petition, p. iv).[3]

The Court of Appeals for the Second Circuit, in reaching that conclusion, misunderstood Gaisman's invention and also his claim 1. The bases of the court's misunderstanding are concisely stated and explained in the petition for writ of certiorari (pp. 3-5) and supporting brief (pp. 9-16)[4] in that case and, therefore, are not repeated here.

While we are convinced that the decision of the Circuit Court of Appeals for the Third Circuit, in the instant case, is correct and would be affirmed by this Court if the petition were granted, we feel that we should direct the attention of the Court to the following:

1. The Circuit Court of Appeals for the Third Circuit, as well as the District Court there, held that petitioner's blade is not only clearly an infringement of the Gaisman patent, but is substantially a copy of the Gaisman blade.

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[2] The Supreme Court of Canada did not hold the corresponding Canadian patent invalid (Appendix to Petition, p. v), and in refusing to follow the decision of the District Court in the *Hawley* case on the question of infringement, stated that "the law to be applied" in the two countries was "not the same" (Appendix to Petition, p. xviii).

[3] The Gaisman blade, petitioner's blade, and the Clark or Hawley blade are illustrated in the frontispiece of the petition for certiorari.

[4] Printed in the appendix to the petition in the present case.

The petition for certiorari discloses no ground for assailing the correctness of that finding and makes no attempt whatever to establish that "clear error" which must be established before this Court will refuse to accept findings in which the two lower Federal courts have concurred.[5]

2. Petitioner devoted only a few lines (less than half a page) to the alleged defense of non-infringement in its brief in the court below, and did not discuss the findings of the Court of Appeals in the *Hawley* case or make any attempt to justify the grounds upon which that decision was based. *Petitioner's conduct confirms the fact that there is no defense of non-infringement.*

3. What, then, does petitioner hope to gain from this petition?

Apparently, petitioner's real reasons for filing the petition are—

(a) Both courts below having decided that petitioner's blade is a copy or substantially a copy of Gaisman's blade, it seems to us that no question of the *scope* of claims 1 and 2 is or could be involved in the present case. What petitioner is asking the Court to do is to pass upon the question of infringement in the *Hawley* case (which cannot now be brought here because the time for bringing it here has long since expired) and to decide that the claims are not of sufficient scope to cover that blade. This is in reality a request for an advisory opinion from this Court as to whether defendant would be free to make the Hawley blade not here involved. As can readily be seen from an inspection of the drawings in the frontispiece of the petition, petitioner's blade is not identical with the Clark or Hawley blade. We urged and still believe that the latter blade, also, embodies the invention

[5] *Bodkin* v. *Edwards*, 255 U. S. 221, 223; *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 558; *Page* v. *Arkansas Gas Corp.*, 286 U. S. 269, 271.

of the patent in suit but the question whether the claims are of sufficient *scope* to cover that blade is not now before this Court.

(b) That the patent would be held not infringed if the writ were granted does not appear to be hoped for, but, rather, petitioner desires another hearing on the question of validity, as to which no conflict exists and which affords no basis for the grant of the writ.[6] Petitioner has not included invalidity as a ground for granting the writ, but has shown such a holding to be its main objective by including that alleged defense among the matters which it says it "intends to urge" if the petition is granted (Brief pp. 7, 8).[7]

It seems to us that petitioner misconceives the purpose of the certiorari jurisdiction of this Court.

Respectfully submitted,

CHARLES NEAVE,
Counsel for Respondent.

HENRY R. ASHTON,
Of Counsel.

April, 1936.

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[6] *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 388, 392, 393; *Magnum Co.* v. *Coty*, 262 U. S. 159, 163; *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 317, 319, 320.

[7] As stated in *Gunning* v. *Cooley*, 281 U. S. 90, 98: "Defendant seeks reversal on a number of grounds that were not mentioned in his petition for the writ. But this court is not called on to consider any question not raised by the petition. *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 464." *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Steele* v. *Drummond*, 275 U. S. 199, 203; *Sanitary Refrigerator Company* v. *Winters*, 280 U. S. 30, 34; *Page* v. *Arkansas Gas Corporation*, 286 U. S. 269, 270, 271.

APPENDIX.

Opinion of the District Court on the Gaisman Patent in the Hawley Case.

Gillette Safety Razor Co. v. Hawley Hardware Co.

No. 2142.

DISTRICT COURT, D. CONNECTICUT.

July 21, 1932.

THOMAS, District Judge.

The Gaisman Patent.

This patent also describes a safety razor of the "Gillette type." Prior to the patentee's invention, that is, prior to 1922, these razors were so constructed that one of the clamping members, that is to say, either the guard member or the cap, was provided with blade positioning elements—for instance pins, which were designed to project through holes in the blade and into holes in the other clamping member, whereby the blade and the clamping member were maintained in shaving relation. For example, in the "old style" Gillette razor, Plaintiff's Exhibit 9, there are two pins on the underside of the cap which pass through two holes in the blade and project through corresponding holes in the guard member. From the underside of the cap there also extends a screw-threaded spindle which passes through a hole in the blade and through a corresponding hole in the guard member. This spindle, however, has no function in positioning the blade. Its sole purpose is to engage

the handle of the razor for clamping together the cap, the blade, and the guard member. In this old construction the blade has no function whatever in positioning the clamping members in relation to one another. The object of the Gaisman invention is stated to be to provide a safety razor wherein the blade co-operates with the guard member to retain the blade in shaving relation thereto, and the blade also co-operates with the cap to retain the latter in proper relation to the blade for shaving purposes, so that the position of the cap with regard to the guard member is maintained by the blade and not by the co-operation of the guard member and cap as is the case in the "old type" Gillette razor. In carrying out the invention, the guard member and the blade have co-operating means to retain the blade in shaving relation on the guard member. This means is in the form of a noncircular projection 1b on the guard member adapted to enter a noncircular opening 2a in the blade. This opening is centrally disposed in the blade. The cap is provided with projections or pins 6 on its underface which are adapted to enter recesses or notches 2b in the blade ends whereby the blade retains the cap in operative relation to the blade and to the guard member. The pins 6 do not engage the guard member. In addition, the cap is provided with a screw-threaded spindle 4 which passes through the blade and through an opening in the guard projection 1b for engagement with the handle 5 of the razor. The screw-threaded spindle and handle serve to clamp together the cap, blade, and guard member. As will be seen from the foregoing, the blade constitutes the connecting link between the cap and guard member, that is, when the blade is removed from the razor, the cap and guard member are adapted to move in relation to one another both longitudinally and transversely. However, when the blade is interposed between the cap and guard member it aligns the cap and guard member. In the "old style" Gillette razor the coacting pins on the cap and holes in the guard member maintain

these two elements in shaving relation even if the blade is removed from the razor.

It appears from the record that the distance at which the cutting edge of a blade projects beyond the cap and guard member must be kept within certain limits. If the cutting edge projects beyond the cap and guard member more than 8/1000 (.008) of an inch, the user is apt to cut himself. If the blade does not project far enough, it is difficult or even impossible to shave with the razor. It is desirable to maintain blade exposure to 4/1000 (.004) of an inch.

In order to maintain the blade exposure within the limits specified, the blade positioning means of the razor and the cap and guard member aligning means must, obviously, be made with predetermined accuracy, as only certain clearances and manufacturing tolerances are permissible. The sizes of the pins on the underface of the cap of the "old style" Gillette razor are maintained within certain specified limits, and so are the sizes of the diameters of the holes in the blade and in the guard member. The clearances, when the parts are assembled, are the free spaces between the sides of the pins and the holes in the blade or in the guard member. The sizes mentioned above must be made so accurately that the total accumulated errors in manufacture will not exceed 8/1000 (.008) of an inch. It is thus apparent that an accumulated error of 8/1000 (.008) of an inch which is divided between the various elements of the razor demands great accuracy in manufacture, and it is correspondingly true that costs of manufacture increase rapidly as standards of accuracy are raised.

The principal utility of the Gaisman invention lies in the fact that it permits less accurate standards of manufacture while maintaining equal accuracy of positioning the cutting edges of the blade with relation to the cap and guard member of the razor. The accumulated error which is possible in the Gaisman razor is less than the

accumulated error of the "old style" Gillette razor. It appears from the evidence that the Gaisman principle reduces the variation of the blade cutting edge exposure approximately one-third or, if the same tolerance and clearances are maintained, the Gaisman principle improves the average qualities of the razor by about one third.

Plaintiff's witness T. L. Smith, the production engineer, testified that the greater the tolerance, the lower the cost, and that the greater the precision required, the greater is the cost of manufacture. If the tolerances are reduced one-third, the costs would perhaps be doubled (pages 310, 311), and there is no controversion of this testimony in the record. Therefore the effect of the Gaisman invention is either to permit manufacture with less accurate measurements of a razor which will shave satisfactorily or, if the same accuracy is maintained, to produce a more accurate, and therefore a better, shaving instrument.

The invention described and claimed in the Gaisman patent in suit is in a modified form employed in plaintiff's so-called "Good Will" razor, Plaintiff's Exhibit 4. In these razors the guard member is provided with two spaced apart projections instead of the single central projection 1b of the patent, and the notches or cut-out corners of the blade take the place of the notches 2b in the ends of the blade shown in Fig. 7. The function and operation of the elements of the "Good Will" razors are the same as those of the Gaisman patent in suit. Of the so-called "Good Will" razors the plaintiff has sold many millions. The cost of manufacture is comparatively low because greater tolerances and clearances are permissible without sacrificing the shaving qualities of the razor.

The defenses are:

C. Invalidity of the claims in view of the prior art;

D. The defendant's razor blades do not embody the alleged combination of claim 1 in suit;

E. If claim 1 is construed to cover defendant's blade, it is invalid in view of the prior art;

F. Claim 3 is not infringed as a matter of law. Claims 1 and 3 read:

"1. A blade having a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member, said blade having means spaced from said opening to cooperate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member."

"3. A safety razor comprising blade clamping members, a blade, means cooperative between one of said members and said blade to retain the latter in shaving relation to said member, said blade and the other member having cooperative means whereby the blade will retain said member in an operative position respecting the blade, and means to detachably clamp the blade between said members."

C. The Prior Art.

While quite a number of alleged prior art patents have been pleaded by defendant, only four of the same received attention at trial, so this discussion will be limited to the four patents discussed by Mr. Campfield, defendant's expert whose testimony was not directed to the facts. The four patents to be considered are as follows:

1. To Clark, No. 933,020, issued August 31, 1909.
2. To Nahemow, No. 952,837, issued March 22, 1910.
3. To Leslie, No. 1,272,816, issued July 16, 1918.
4. To Gaisman, No. 1,011,938, issued December 19, 1911.

The questions presented, so far as the four prior art patents are concerned, are exceedingly simple and they may be resolved into two: First, do the four prior art patents, either singly or in combination, disclose a safety razor in which a cap is free to move relative to the guard

when the blade is removed from the razor? Second, do these prior art patents describe or illustrate a blade of the "Gillette type" which forms the connecting link between the guard member and cap? The answers to these questions must be in the negative, as will be shown by a discussion of the patents.

The Clark Patent No. 933,020.

This patent shows a razor of the "Gillette" type with a positive connection between the cap and the guard member. From the blade contacting face of the guard extends a projection 15 adapted to enter a performation 14 in the blade and recesses 21 in the cap. Therefore the cap is positively positioned with relation to the guard just as the cap in the "old style" Gillette razor is positioned by its pins with reference to the guard. This razor is exactly like the "old style" Gillette. It does not embody the Gaisman invention. It accumulates the manufacturing errors and it fails to eliminate them.

The Nahemow Patent No. 952,837.

This patent also shows a razor of the old "Gillette type." The guard is made of two pieces which are adjustable to vary its width. The cap has a screw-threaded shank 20 which is provided with an enlarged angular head 21 at its inner end to fit the opening 15 in the guard and the central angular opening in the blade marked 26. All that has been said about the Clark patent applies also to this patent.

The Leslie Patent No. 1,272,816.

Defendant's expert relies particularly on this patent. It discloses a razor which is provided with two blades both of which are flat and, as stated in the specification, "thin yet stiff." The claims, too, call for "a substantially non-flexible blade." It must be remembered that Gaisman

provides a flexible blade in contrast to the non-flexible blade shown and described in the Leslie patent, in which patent the cap is positioned by the guard and the blade has nothing whatever to do with the positioning of the cap in relation to the guard.

The Prior Gaisman Patent, No. 1,011,938.

This patent discloses a blade having three polygonal openings corresponding to the three openings of the "old style" Gillette blade. No mention whatever is made in this patent of the features which are characteristic of and described and claimed in the Gaisman patent in suit. Hence I conclude that the prior art cited and relied upon by defendant cannot invalidate claims 1 and 4 of the Gaisman patent in suit.

The Canadian Judgment.

[5] Subsequent to the final hearing, defendant filed with the court a certified copy of an opinion rendered by the Exchequer Court of Canada on May 27, 1932, in a suit brought for the infringement of a Canadian patent by Gillette Safety Razor Company of Canada, Limited, *v.* Pal Blade Corporation, Limited, and Metropolitan Stores, Limited, alleging that the Canadian suit was founded on the Canadian patent corresponding to the Gaisman patent involved in the case at bar. It appears from this judgment that claim 4 of the Canadian patent is the same as claim 1 of the Gaisman patent in suit and that claim 4 was held invalid by Judge MacLean. There is nothing, however, in this record or in anything submitted after final hearing which shows that the Canadian case was presented and considered by the court upon the same record as the one which has been made in the case at bar. In any event, even though we indulge in the violent presumption that the record there was the same as the

record here, I should not feel inclined to surrender my own judgment and the conclusions herein reached and stated upon the issues herein presented. If the record there was the same as the record here, I should, with all due respect for the judgment of the Canadian court, dissent from the opinion filed by Judge MacLean. Comity is not a rule of law, but one of practice, convenience, and expediency. It requires of no court to abdicate its individual judgment, and is applicable only where, in its own mind, there may be a doubt as to the soundness of its views. This principle is clearly stated by Mr. Justice Brown in Mast, Foos & Co. *v.* Stover Manufacturing Co., 177 U. S. 485, at page 488, 20 S. Ct. 708, 710, 44 L. Ed. 856, where he said: "Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts."

D. Defendant's Blades Do Not Embody Combination of Claim 1.

[6] As a further defense it is urged by the defendant that its razor blades, Plaintiff's Exhibit 6, neither embody the structure defined in claim 1 of the Gaisman patent nor

perform the function specified therein. This contention is based, as I view it, upon a complete misunderstanding of the Gaisman patent by defendant's expert and on the wrong assumption that Plaintiff's Exhibit 3, bar type razor, is made in accordance with the Gaisman patent in suit. As appears very clearly from plaintiff's proofs, it is its own good will razor, Plaintiff's Exhibit 4, which is constructed according to the teachings of the Gaisman patent.

Claim 1 of the Gaisman patent specifies:

1. "A non-circular opening substantially centrally disposed" having the function of retaining the blade in shaving relation to a guard member; and

2. "Means spaced from said opening," that is, the recesses or notches 2b in the ends of the blade, the function of which is "to cooperate with a clamping member (the cap) to retain the latter (the cap) in shaving relation to the blade independent of the guard member."

In other words, this claim covers a razor blade having two characteristics—one of which is a central opening for positioning the blade on the guard member, and the other the notches in the ends of the blade to locate the cap on the blade. Defendant's Clark Ace blade, Plaintiff's Exhibit 6, embodies the two essential elements of claim 1 and has their functions. The Ace blade has a noncircular opening in the form of a slot which is centrally disposed in the blade in the respect that it is located in the longitudinal axis of the blade. This slot serves to retain the blade in shaving relation to the guard member as may be readily ascertained by placing the blade on the guard of a good will razor, Plaintiff's Exhibit 4. It also has "means" (the notches or recesses in the four corners of the blade) "spaced from said opening," and these notches "cooperate with a clamping member (the cap) to retain the latter in shaving relation to the blade independent of

the guard member," as may be readily seen by mounting the blade on the cap of a good will razor, Plaintiff's Exhibit 4. An inspection of the good will razor with a Clark Ace blade mounted thereon clearly discloses the fact that the blade forms the connecting link between the cap and the guard member, which otherwise are free to move both longitudinally and laterally with respect to each other.

Defendant argues that its Clark Ace blade does not include a noncircular opening substantially centrally disposed to retain the blade in shaving relation to the guard member, because the guard members of the Gillette good will razors are not provided with any projection whatsoever upon which the noncircular centrally disposed (square) opening of the defendant's blade can fit, and that there are no projections on the cap of the Gillette good will razor which could be construed as a substitute or equivalent of the diamond shaped snugly fitting projection 1b of the Gaisman patent. There is no merit in this contention. The Gillette good will razor has two diamond-shaped projections on its guard which fit into the centrally disposed noncircular slot in the Clark Ace blade and thereby retain the blade in shaving relation to the guard member.

Defendant further argues that the parts of the razor of the Gaisman patent in suit are not "in shaving relation" until the handle has been screwed down and has caused the cap and the guard member to flex and then clamp the blade between them. This argument is based upon a misunderstanding of the term "shaving relation." When the parts of the Gaisman razor are assembled with the blade between them, and before the handle is screwed down to clamp the parts together, the blade is in shaving relation with respect to the guard member and the cap is in shaving relation to the blade independent of the guard member. The parts, however, are not in shaving position, meaning thereby that the blade has not yet been flexed. Inasmuch as the claim does not call for shaving position,

but only for shaving relation, it is evident that defendant's argument is not well taken.

In view of the foregoing, I conclude and hold that Plaintiff's Exhibit 6, Clark Ace blades, infringe claim 1 of the Gaisman patent in suit.

E. If Claim 1 is Construed to Cover Defendant's Blade, it is Invalid in View of the Prior Art.

As a further defense it is asserted by defendant that if claim 1 of the Gaisman patent in suit is construed to cover defendant's blade, it is invalid in view of the prior art. All the argument on this point is based upon the fact that some of the prior art patents show noncircular centrally disposed positioning openings and on the assumption that the noncircular positioning opening in the Gaisman blade does not retain the blade in shaving relation to a guard member, and on the further allegation that notches or recesses in blades are old for co-operation with one of the clamping members of a razor.

It appears from the discussion of the prior art, *supra,* that the blades disclosed in the patents relied on by the defendant do not and cannot function in the manner called for by claim 1 of the Gaisman patent in suit. It is also apparent that the noncircular central opening in the Gaisman blade has the function of retaining the blade in shaving relation to a guard member. Nevertheless, even if every element of the combination defined by claim 1 of the Gaisman patent was old, the claim would be valid because it is a general rule that a patentable invention may consist entirely in a new combination or arrangement of old and well-known elements or ingredients provided a new and useful result is thereby attained. Inasmuch as the result obtained by Gaisman is new and useful, it follows that claim 1 is valid. This doctrine is clearly stated by Judge Thayer, speaking for the Circuit Court of Appeals, Eighth Circuit, in Fairbanks, Morse & Co. *v.* Stickney,

123 F. 79, at page 82, where he said: "Even if it be conceded that the individual elements composing the combination are to be found in the prior art, yet, to make the selection of these parts from the prior art, and to combine them, as Hobart did, so as to produce a clutch which is at the same time, simple, compact, effective, and useful, required, as we think, more than ordinary mechanical skill."

[7] It is not of consequence that the elements of each claim may be old, for the claims are for a combination, and if the combination is new, or if by a new method of organization new or better results are obtained, the patent may be sustained. Dunn Mfg. Co. *v.* Standard Computing Scale Co., 163 F. 521 (Circuit Court of Appeals, Sixth Circuit); Davis *v.* Perry (C. C. A.) 120 F. 941; Brown *v.* Huntington Piano Co. (C. C. A.) 134 F. 735; Hobbs Mfg. Co. *v.* Gooding (C. C. A.) 111 F. 403, 406; Dececo Co. *v.* George E. Gilchrist Co. (C. C. A.) 125 F. 293, 298, 299; Western Electric Co. *v.* North Electric Co. (C. C. A.) 135 F. 79, 89; Sanders *v.* Hancock (C. C. A.) 128 F. 424, 433, 434.

[8] The fact that all of the elements of a combination may be found in the prior art and apparently in combination in the claims of prior patents does not anticipate unless, when read in connection with the specification of the patent in suit, the structure and function of the invention appears. Warren Steam Pump Co. *v.* Blake & Knowles Steam Pump Works, 163 F. 263 (Circuit Court of Appeals, First Circuit). For the reasons given I conclude that the defenses interposed cannot prevail.

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Supreme Court of the United States

OCTOBER TERM, 1936.

ESSEX RAZOR BLADE CORPORATION, Petitioner, vs. GILLETTE SAFETY RAZOR COMPANY, Respondent.	No. 21

BRIEF FOR RESPONDENT.

The Opinions Below.

The opinion of the Circuit Court of Appeals (R. 230) is reported in 83 F. (2d) 541. The first (oral) opinion of the District Court (R. 96) is not reported. The second (written) opinion of the District Court (R. 231) is reported in 13 F. Supp. 505.

Jurisdiction.

This case is here on a writ of certiorari to the Circuit Court of Appeals for the Third Circuit under the provisions of Title 28, Section 347 of the United States Code. The petition for writ of certiorari was granted May 4, 1936. The judgment of the court below was entered March 5, 1936 (R. 245).